UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
SANDRA MAE HOYLE,	)	CASE NO. BK96-81160
	)	
DEBTOR	)	CH.
		Fil. No. 21, 27

MEMORANDUM

Hearing was held on October 21, 1996, on Motion for Turnover of Property and for Sanctions. Appearances: Ronald Hunter for the debtor and Margaret McDevitt and Mark Quandahl for first of Omaha Service Corporation. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(E).

FACTS

Prepetition, a judgment was entered against the debtor in Pottawattamie County, Iowa, District Court. Pursuant to execution upon said judgment, debtor's wages were garnished.

At the time that the debtor filed this Chapter 13 case, $264.06 of the debtor's wages was being held by the Pottawattamie County District Court Clerk. Sometime after receiving notice of the bankruptcy filing, counsel for the judgment creditor notified the employer that the garnishment was released. However, counsel took no action to attempt to obtain a release of the funds being held by the Clerk of Court.

Counsel for the debtor, on many occasions, contacted counsel for the judgment creditor and requested that action be taken to release the funds. Counsel for the creditor took the position then, and at a hearing on a request for sanctions, that the creditor not only had no obligation to take affirmative action to obtain release of the funds, but that it was probably precluded from taking such action by a bankruptcy court decision in the southern district of Iowa. Therefore, counsel took no action.

Eventually, counsel for the debtor was informed by the Clerk of Court that a form order needed to be prepared and submitted to a Pottawattamie County District Court judge to release the funds. That order was to be submitted by counsel for the judgment creditor. Debtor's counsel contacted creditor's counsel and provided that information. No action was taken. Eventually, a

representative of counsel for the creditor agreed that, if counsel for the debtor would prepare the order, counsel for the creditor would obtain a signature from the appropriate judge.

Counsel for the debtor did prepare the order and did submit it to counsel for the creditor. Nothing happened.

This motion for sanctions was then filed. On approximately the same date that this motion for sanctions was filed, the order was submitted to the appropriate judge and the funds were released.

The debtor, through counsel, proceeded with the hearing on the motion for sanctions because of the intransigence of counsel for the creditor and because of the fees incurred by the debtor as a result of such intransigence.

ISSUES

1. Does a judgment creditor have a duty to take affirmative action to obtain a release of funds being held by a clerk of court pursuant to a garnishment of wages caused by such creditor?

2. Is it a sanctionable violation of 11 U.S.C. § 362(a) to fail to obtain such a release?

DECISION

A creditor must take affirmative action to obtain release of funds of the debtor and failure to do so is sanctionable and is a violation of the automatic stay.

DISCUSSION

At the hearing on the motion for sanctions, the creditor's attorney suggested that counsel could find no cases putting upon the creditor any requirement of affirmative action to obtain release of debtor's funds. However, several cases have made it clear that the creditor is responsible for terminating any garnishment proceeding when it has knowledge of the debtor's bankruptcy filing. If the creditor has knowledge and takes no action to stop the garnishment, it has violated the automatic stay, 11 U.S.C. § 362(a)(1). Matter of Alberti, Neb. Bkr. 90:643 (Bankr. D. Neb. 1990). The court at In re Timms, 178 B.R. 989 (Bankr. E.D. Tenn. 1994) stated that a creditor willfully violates the automatic stay even when it takes no affirmative action to continue the proceeding. The court also stated that "willful" does not refer to a specific intent to violate a court order, but a willful violation of the automatic stay occurs when

the creditor has knowledge of the debtor's bankruptcy filing and does nothing to stop the garnishment. Id. at 997.

In the case before the court, the creditor, through counsel, did stop the future garnishment of the debtor's wages. However, that is not enough. A garnishment and the resulting deposit of garnished funds with the clerk of court is a judgment creditor instigated action which cannot be stopped or changed by requests or action by the judgment debtor. The judgment creditor controls not only the initial garnishment proceeding, but the distribution of funds deposited with the clerk. The creditor has to be responsible for getting the funds out of the hands of the court and returning them to the debtor. The debtor has no such power. In re Elder, 12 B.R. 491 (Bankr. N.D. Ga. 1981), is on point. That court held that the creditor should notify the court holding the funds that the funds should be surrendered to the debtor. Id. at 495.

In the case before this court, the creditor argues that the debtor is responsible for getting her own money from the court. However, even ignoring the impracticality of such a requirement, to impose this burden on the debtor would subject her to financial pressure that the automatic stay is meant to abate. In re Dungey, 99 B.R. 814 (Bankr. S.D. Ohio 1989). In other words, the debtor should not be required to employ counsel to petition a court for a release of funds when the debtor is under the protection of the bankruptcy laws and the creditor has total control over the distribution of the funds.

During the hearing on the motion, counsel for the creditor claimed that the creditor was prohibited from applying for the funds because of the decision in the case of In re Yetter, 112 B.R. 301 (Bankr. S.D. Iowa 1990). That opinion is not applicable. It prohibited the creditor from obtaining funds from the court for its own benefit. In this case, the creditor was expected to obtain the release of funds for the benefit of the debtor and action by the creditor was the only means by which the funds would be released to the debtor. Taking the action of obtaining disbursement of the funds to the debtor would not have been a violation of the automatic stay and actually would have terminated the creditor's violation of the automatic stay.

The creditor willfully violated the automatic stay by failing to take affirmative action to obtain disbursement of garnished funds for the benefit of the debtor. The Bankruptcy Code at 11 U.S.C. § 362(h) provides that if an individual debtor is injured by a willful violation of the automatic stay, that debtor can recover actual damages, including costs and attorney fees, and in appropriate circumstances, may recover punitive damages. This case does not provide the "appropriate circumstances" which would allow the court to impose punitive damages. The amount in controversy was relatively small, and

counsel for the creditor had at least one Iowa bankruptcy case to rely upon. The fact that this court has found such reliance was inappropriate does not raise the failure to act affirmatively to the level of egregiousness that would be required for the imposition of punitive damages.

On the other hand, although the amount in question seems to be relatively small, it is 24% of debtor's take-home pay, and that amount may be extremely significant to the financial stability of the debtor. In addition, the expenses incurred by the debtor in attempting to obtain that "relatively small" amount of money, should not have been required. Therefore, actual damages, including costs and attorney fees, will be imposed as a sanction for the violation of the automatic stay.

Counsel for the debtor may submit affidavit evidence of actual damages, including costs and attorney fees, by November 22, 1996. Copies of the affidavit shall be provided to counsel for the creditor who is granted until December 6, 1996, to respond or object to the damage amounts claimed. If an objection to the amounts claimed is filed, a hearing shall be scheduled. If no objection to the amounts claimed is filed, the court will review the affidavit evidence of actual damages and rule without further hearing.

This memorandum is not a final order. A final, appealable, order will be entered after full consideration of the request for actual damages is submitted.

DATED: November 8, 1996.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
McDEVITT, MARGARET\QUANDALL, MARK 554-0339

Copies mailed by the Court to:
Ron Hunter, Attorney
Kathleen Laughlin, Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.